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88-7146

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

JONAS H. WHITMORE,
INDIVIDUALLY AND AS
NEXT FRIEND OF
RONALD GENE SIMMONS — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I.

Does the Constitutional ban against cruel and unusual punishment require that a mandatory appellate review be conducted in all cases in which the death penalty has been imposed?

II.

If mandatory appellate review of death penalty sentences is Constitutionally required, may that issue be raised by a third party?

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PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARKANSAS

Petitioner, Jonas H. Whitmore, individually and as next friend of Ronald Gene Simmons, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding on March 13, 1989, in which Petitioner Whitmore was denied the right to intervene in behalf of Ronald Gene Simmons, an Arkansas inmate scheduled to die by lethal injection. Simmons had refused to appeal both this conviction and an earlier conviction for which he was also sentenced to death by lethal injection.

CITATION TO OPINIONS BELOW

The opinion of the Arkansas Supreme Court in Franz, Individually and as Next Friend of Ronald Gene Simmons v. State (July 11, 1988) is reproduced as Appendix A hereto and is reported at 296 Ark. 181 (1988).

The opinion of the Arkansas Supreme Court in Simmons v. State (March 10, 1989) is reproduced as Appendix B hereto and is reported at 298 Ark. 193 (1989).

The opinion of the Arkansas Supreme Court in Whitmore, Individually and as Next Friend of Ronald Gene Simmons v. State (March 13, 1989) is reproduced as Appendix C hereto and is reported at 298 Ark. 255 (1989).

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on March 10, 1989, which allowed Ronald Gene Simmons to waive his direct appeal of the imposition of the death penalty, and a motion by Petitioner Whitmore to intervene and to stay the execution was denied on March 13, 1989. On March 15, 1989, this Court granted a stay of the execution of Ronald Gene Simmons pending the timely filing of a petition for writ of certiorari. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), the Petitioner asserting herein, and having asserted below, a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, which provide, in relevant part:

> [Nor shall any person] be deprived of life, liberty, or property without due process of law. . .
>
> Fifth Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Eighth Amendment

> [Nor] shall any state deprive any person of life, liberty, or property without due process of law. . .
>
> Fourteenth Amendment

The case also involves the Arkansas capital murder statutory scheme (Ark. Code Ann. §§5-4-601 through 5-4-617 and 5-10-101); Arkansas Rules of Criminal Procedure, Rule 36.1, 36.24, 36.25 and 36.26; and Rule 11(f) and (h) of the Rules of the Arkansas Supreme Court; the text of each being attached hereto as Appendix D.

STATEMENT OF THE CASE

On February 10, 1989, Ronald Gene Simmons (hereinafter "Simmons") was convicted of capital murder (Ark. Code Anno. §5-10-101) for the deaths of fourteen family members and sentenced by the jury to death. Simmons expressed his desire that the sentence be carried out without appellate review of the trial. Simmons v. State, 298 Ark. 193 (1989).

Simmons had previously been convicted on May 16, 1988, of capital murder and sentenced to death, at which time he expressed his desire that "absolutely no action by anyone be taken to appeal or in any way change this sentence". Franz v. State, 296 Ark. 181, 183 (1988). This earlier case will hereinafter be referred to as "Simmons I" while the latter case which is the subject of this petition will be referred to as "Simmons II" when such distinction is necessary for clarity.

The trial court in Simmons I conducted a hearing to determine whether Simmons was mentally competent to waive his right to appeal and whether such waiver was knowingly and intelligently made. Following a finding by the trial court of competency and knowing and intelligent waiver, an execution date was set. At this point, Rev. Louis Franz, a catholic priest who ministers to Arkansas death row inmates petitioned the Arkansas Supreme Court to intervene as next-friend and for a stay of execution. Franz v. State, 296 Ark. at 183.

The Arkansas Supreme Court stayed the execution and requested the parties to brief the following issues: (1) whether the intervenor, Franz, had standing; (2) whether

Arkansas should adopt a rule for mandatory review of death cases; (3) whether, if mandatory review is not required, a review should be conducted of the waiver of appeal; and (4) whether Simmons had knowingly and intelligently made such waiver. Franz, Id. at 183-184.

The Arkansas Supreme Court, in ruling upon this case of first impression, was unanimous in finding that Rev. Franz lacked standing to raise the issue of the absence of a mandatory appeal in death penalty cases. The court based its holding to this question on the precedents of Gilmore v. Utah, 429 U.S. 1012 (1976); Lenhard v. Wolff, 443 U.S. 1306, stay of execution denied 444 U.S. 807 (1979); and Davis v. Austin, 492 F.Supp. 273 (N.D.Ga. 1980).

Despite its holding on lack on standing, the court reached the issue of the constitutionality of absence of mandatory appeal, and, with two members dissenting, found no constitutional violation. The court in finding no requirement for mandatory appeal, saw no conflict with its own Rule 11(f) or Arkansas Rules of Criminal Procedure, Rule 36.24, both of which impose an obligation upon it to "review all errors prejudicial to the rights of a [death penalty defendant]". The text of these provisions is set out in Appendix D hereto.

The Arkansas Supreme Court then established a rule for future cases:

> . . . .when a lower court has made a determination that a capital defendant can make a knowing and intelligent waiver of appeal, and has done so, the State has the burden of bringing the record of the lower court proceeding on this issue to this Court for review. . . it must be lodged at least seven days before the execution date. We will then review the proceeding to determine whether the defendant had the capacity to understand the choice between life and death and to knowingly and intelligently waive his rights to appeal his sentence of death.
>
> Franz, Id. at 189-190.

A federal habeas petition was then filed by Rev. Franz (Franz v. Lockhart, 700 F.Supp. 1005 (E.D. Ark. 1988))

alleging, inter alia, the unconstitutionality of the Arkansas death penalty statutes (Ark. code Anno. §§5-4-601 through 617 and 5-10-101) for their failure to provide mandatory appellate review. On September 23, 1988, the U.S. District Court, Hon. G. Thomas Eisele, Judge, issued an Opinion and Order finding the absence of mandatory appeal to be constitutionally defective but also finding that Rev. Franz had no standing to raise the issue in behalf of Simmons. The petition for habeas in Simmons I was thus denied and is currently on appeal to the United States Court of Appeals for the Eighth Circuit.

Against this legal backdrop, following his conviction on February 10, 1989, Simmons petitioned the Arkansas Supreme Court for an expedited review of his waiver of appeal in accordance with its earlier holding in Franz v. State. On March 10, 1989, the Arkansas Supreme Court found the waiver to be knowingly and intelligently made (Simmons v. State, 298 Ark. 193 (1989) and that the execution scheduled for March 16, 1989, could proceed. That opinion is appended hereto as Appendix B.

On March 13, 1989, Jonas H. Whitmore filed a motion with the Arkansas Supreme Court to intervene and for stay of execution, individually and as next friend of Ronald Gene Simmons. Whitmore is an inmate on Arkansas death row whose conviction and sentence have been affirmed on direct appeal, Whitmore v. State, 296 Ark. 308 (1988). On March 13, 1989, the Arkansas Supreme Court issued a per curiam opinion denying the motion by Whitmore based upon his lack of standing. Simmons v. State, 298 Ark. 255 (1989). A copy of Whitmore's petition is attached hereto as Appendix E and the decision of the Arkansas Supreme Court denying intervention is appended hereto as Appendix C.

On March 15, 1989, a stay of execution pending the filing of a petition for writ of certiorari was granted by this Court (A-727).

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE

WHETHER THE EIGHTH AMENDMENT'S BAN AGAINST CRUEL AND UNUSUAL PUNISHMENT REQUIRES THAT A MANDATORY APPELLATE REVIEW BE CONDUCTED WHEN A SENTENCE OF DEATH IS IMPOSED AND TO DETERMINE WHETHER A THIRD-PARTY MAY ASSERT SUCH CONSTITUTIONAL RIGHT IN BEHALF OF THE PERSON SENTENCED.

A. MANDATORY APPEAL

As used herein, Petitioner would define "mandatory appeal" as being one which may not be waived by the defendant; this is in contrast to "automatic appeal" which a defendant may not be precluded from pursuing but which he may knowingly and intelligently waive. Arkansas provides "automatic appeal" of all criminal cases, including capital cases. Franz v. State, 296 Ark. 181 (1988).

Of the 37 states authorizing capital punishment, apparently only Arkansas fails to provide for mandatory appellate review of either the entire trial or the sentencing phase (Franz v. State, 296 Ark. 181, 196-197, Glaze, J. dissenting). The Arkansas Supreme Court reached its conclusion that mandatory appeal was not a constitutional requirement by relying upon Gilmore v. Utah, 429 U.S. 1012 (1976), although it recognized that Gilmore was, at least, in partial conflict with Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt V. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976):

> The idea that in Gregg, Proffitt, and Jurek, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in Gilmore. . .
>
> Franz, 296 Ark. at 187 quoting from Collins v. State, 261 Ark. 195, cert. den'd 434 U.S. 878 (1977)

The Arkansas Supreme Court did not address the implicit, and equally important, question of whether its arguable interpretation of the holding of Gilmore in 1976 now reflects "the evolving standards of decency that mark the progress of a

maturing society" in 1989. Gregg v. Georgia, 428 U.S. 153, 173 (1976) quoting Trop v. Dulles, 356 U.S. 86, 101 (1958). In this regard, it is of interest to note that Utah amended its laws within two years of the execution of Gary Gilmore to require mandatory appellate review in capital cases.

In its interpretation of Gilmore, the Arkansas Supreme Court has incorrectly assumed that this Court's failure to reach the underlying questions, because of the lack of standing of the petitioner, amounted to a rejection of principles which have, in fact, continued to maintain their vitality. Had the Arkansas Supreme Court more closely reviewed those cases, it would have found compelling precedent for the constitutional requirement of mandatory appeal. Among those holdings:

> [A]s an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice. . . .
>
> Gregg v. Georgia, 428 U.S. 153, 198 (1976)

> [o]ur decision in this case [upholding the Georgia death penalty statutes] depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.
>
> Zant v. Stephens, 462 U.S. 862, 889 (1983)

Similar, but stronger, language appears in the concurring opinion to Pulley v. Harris, 465 U.S. 37 (1984):

> I believe the case law does establish that appellate review plays an essential role in eliminating the systematic arbitrariness and capriciousness which infected death penalty schemes invalidated by Furman [cite omitted], and hence that some form of meaningful appellate review is constitutionally required. . . in each of the statutory schemes approved in our prior cases, as in the scheme we review today, meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid.
>
> Concurring opinion of Mr. Justice Stevens, Id. at 55-59

The question presented to this Court which compels the granting of this writ to determine the constitutional requirement of mandatory appellate review, cannot be better expressed than it is in the Opinion of the District Court issued in Simmons I:

> . . . .when we speak of the requirement that executions not take place until a death sentence has been reviewed we are not talking about a "right" that is personal to Mr. Simmons. It is, rather, the embodiment of societal values against cruel and unusual punishment. If a state court sentenced a defendant to be boiled in oil, and the defendant, for whatever reason, declined to object, would a horrified nation be forced to stand by while the sentence was carried out? If a defendant is innocent, may the state be allowed to convict and execute him because he wishes to be executed?
>
> Franz v. Lockhart, 700 F.Supp. 1005, 1023 (E.D. Ark. 1988)

B. STANDING OF THIRD PARTY

If, arguendo, the Arkansas death penalty statutes are constitutionally defective because of the absence of a mandatory appellate review provision, this Court should grant certiorari to address the question of whether, as a matter of important public policy, the strict requirements of standing should be relaxed, altered, or even disregarded when that constitutional defect could result in the execution of an innocent, or illegally convicted, defendant.

This Court has, in past cases, recognized that although its Article III powers do not allow it to consider "generalized grievances about the conduct of government", Flast v. Cohen, 392 U.S. 83, 106 (1968), the strict requirement of standing is, in some applications, only a "rule of practice" and that

exceptions may exist "where there are weighty countervailing policies", United States v. Raines, 362 U.S. 17, 22 (1960) citing Barrows v. Jackson, 346 U.S. 249 (1953) and N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

Such weighty policy considerations have often been found to exist in the area of First Amendment rights: Eisenstadt v. Baird, 405 U.S. 438 (1972) ("one who acted to protect the rights of a minority and the minority itself" Id. at 445); Dombrowski v. Pfister, 380 U.S. 479 (1965) ("we have fashioned this exception to the usual rules governing standing" [cite omitted] because of the ". . .danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application". [cite omitted]. Id. at 486-487.

In the area of civil litigation, the issue of standing has lead to the evolution of the "zone of interest" test, Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970) which was expansively applied in United States v. SCRAP, 412 U.S. 669 (1973) to give standing to an ad hoc group of law students to challenge a railroad rate increase that could have diverted natural resources out of the area and caused "economic, recreational and aesthetic harm". Id. at 675-76.

Does the potential public harm from the unreviewed imposition of the death penalty rise to the level which would justify a departure from the strictest requirements of standing? Justice Hickman of the Arkansas Supreme Court provides some guidance in this inquiry; for the period since Arkansas reinstated the death penalty, he has kept a record of all capital cases tried in Arkansas which he periodically adds as separate opinions to cases decided. Using his data for cases since 1983 through February 1989: during that period of time, the Arkansas Supreme Court reviewed 19 cases where the death penalty was imposed and affirmed in 11 (57.8%). Fretwell v. State, 289 Ark. 91, 99 (1986) (Hickman, J., concurring) and

Robertson v. State, 298 Ark. 131, 137 (1989) (Hickman, J., concurring). Thus, over 40% of those receiving the death penalty during this period of time had their convictions or sentences reversed on the first appellate review of the trial proceedings.

Petitioner Whitmore was sentenced to death for the death of one person during the commission of a robbery and is currently seeking post-conviction relief in state court. Since the Arkansas Supreme Court has committed to a rule of comparative review (". . .we must compare the wicked, inhumanity, and heinousness of this capital case with other capital cases." Whitmore v. State, 296 Ark. 308, 316 (1988)), the Petitioner Whitmore and all present and future individuals sentenced to death in Arkansas, are prejudiced by the failure of the Arkansas Supreme Court to provide for mandatory review so that crimes such as Simmons' may be included within the data base.

Gilmore v. Utah, supra, was decided in 1976 when no person had been executed since the decision in Furman v. Georgia, 408 U.S. 238 (1972). Since Gilmore's execution on January 17, 1977, over 100 persons have now been executed, and the numbers will apparently increase geometrically; Petitioner respectfully urges this Court to grant certiorari to determine whether a civilized society, living under the rule of law, can assure its citizens that none among them will be deprived of life without due process of law, while it shields its eyes from such violations behind the screen of "standing".

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to determine whether the Eighth Amendment's ban against cruel and unusual punishment requires mandatory appellate review in death penalty cases and whether that right may be asserted by a third party.

Respectfully submitted,

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Rev. Louis J. FRANZ, Individually and as Next Friend of Ronald Gene Simmons *v.* STATE of Arkansas

CR 88-76

Supreme Court of Arkansas
Opinion delivered July 11, 1988

1. COURTS — STANDING — NEXT-FRIEND STANDING — TWO REQUIREMENTS. — The petitioner must first meet the threshold requirement of showing he is a next friend; if that showing is made, petitioner must also demonstrate that a next-friend suit is maintainable because the person on whose behalf he acts is incompetent.
2. PARTIES — INSUFFICIENT RELATIONSHIP SHOWN FOR NEXT-FRIEND STATUS. — Where petitioner was a catholic priest who counsels inmates at the Arkansas Department of Correction, but nothing indicates he is the defendant's minister, spiritual adviser, or confidant, or even less, that the two have ever met, petitioner failed to allege any facts to show that his relationship to the defendant is sufficiently close to give rise to next-friend status.
3. TAXATION — TAXPAYER SUIT MUST BE COMMENCED IN A TRIAL COURT. — A taxpayer suit under article 16, section 13 of the Arkansas Constitution to prevent an illegal exaction must be commenced in a trial court; such a suit cannot be commenced in the appellate court.
4. TAXATION — TAXPAYER-SUIT PROVISION NOT SO BROAD THAT IT GIVES ONE TAXPAYER THE RIGHT TO INTERVENE IN THE MERITS OF A CRIMINAL CASE AGAINST ANOTHER PERSON. — The constitutional provision for a taxpayer suit is not so broad that it gives one taxpayer the right to intervene in the merits of a criminal case against another person.
5. COURTS — STANDING — IMPORTANT LEGAL ISSUES UNRESOLVED — INSUFFICIENT TO GRANT STANDING. — The existence of important legal issues which remain unresolved at the appellate level was insufficient reason to grant petitioner standing to challenge the defendant's death penalty.
6. APPEAL & ERROR — NO MANDATORY APPELLATE REVIEW IN DEATH PENALTY CASES. — There is no mandatory appellate review in Arkansas for death penalty cases.
7. CONSTITUTIONAL LAW — LACK OF MANDATORY REVIEW DOES NOT RENDER LAW UNCONSTITUTIONAL. — The lack of mandatory review in death penalty cases does not render Arkansas' death penalty unconstitutional.
8. CRIMINAL PROCEDURE — APPEAL NOT MANDATED IN DEATH

PENALTY CASES. — The provisions of Ark. Code Ann. § 16-91-113(a) (1987), Ark. R. Crim. P. 36.24, and Ark. R. Sup. Ct. 11(f) simply mean that the Arkansas Supreme Court must make its own examination of the record when an appeal is taken in such cases; they do not mandate an appeal.

9. CRIMINAL PROCEDURE — DEATH PENALTY — WHEN WAIVER OF RIGHT TO APPEAL PERMITTED. — In Arkansas, a defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence.

10. CRIMINAL PROCEDURE — DEATH PENALTY — MANDATORY REVIEW OF COMPETENCY HEARING. — When a lower court has made a determination that a capital defendant can make a knowing and intelligent waiver of appeal, and has done so, the State has the burden of bringing the record of the lower court proceeding on this issue to the Arkansas Supreme Court for review.

11. APPEAL & ERROR — WHEN RECORD SHOULD BE LODGED ON MANDATORY REVIEW OF COMPETENCY TO WAIVE RIGHT TO APPEAL IN DEATH CASE. — The record of the determination of competency to waive right to appeal should, if possible, be lodged in the Arkansas Supreme Court after the time for appeal has lapsed, but, in any event, it must be lodged at least seven days before the execution date.

12. APPEAL & ERROR — REVIEW OF SUPREME COURT — MANDATORY REVIEW OF DETERMINATION OF COMPETENCY TO WAIVE RIGHT TO APPEAL IN DEATH CASE. — The Supreme court will review the proceeding to determine whether the defendant had the capacity to understand the choice between life and death and to knowingly and intelligently waive his rights to appeal his sentence of death; the standard of review, as in other types of criminal cases, is whether the trial judge's conclusion is clearly erroneous.

13. CRIMINAL PROCEDURE — NO ERROR IN FINDING DEFENDANT COMPETENT TO WAIVE RIGHT TO APPEAL DEATH SENTENCE. — Where the defendant's attorneys stated the defendant was "sane, rational, responsible and able to make his own decisions"; a highly qualified defense psychiatrist unequivocally stated that the defendant understood the consequences of his choice, was capable of making a rational decision, and was doing so freely and voluntarily; a State Hospital psychiatrist, after a 60-day evaluation before the trial and a second hour-and-a-half exam after the trial, testified the defendant understood the consequences of his choice and had made his choice knowingly, the trial court did not err in finding the defendant competent to waive his right to appeal; and where, a

month later at a second post-trial competency hearing, no other member of the State Hospital evaluation team testified, and neither the defense psychiatrist nor the defense attorneys retracted in any manner their statements that the defendant was competent to waive his right to appeal, even though the State Hospital psychiatrist "doubted" his original opinion because one sentence in a full page letter the defendant had written "hinted" at psychosis, the appellate court affirmed the trial court's ruling that the defendant was competent to waive his unqualified right to appeal.

Petition to Intervene as Next Friend; denied.

Mark S. Cambiano, for appellant.

Steve Clark, Att'y Gen., by: *Jack Gillean*, Asst. Att'y Gen., for appellee.

John Harris and *Robert E. Irwin*, for Ronald Gene Simmons.

ROBERT H. DUDLEY, Justice. On May 16, 1988, Ronald Gene Simmons was convicted of capital murder and sentenced to death in the Circuit Court of Franklin County. Immediately after being sentenced, Simmons took the stand and made a statement that included the following: "I, Ronald Gene Simmons, Sr., want it to be known that it is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence. It is further respectfully requested that this sentence be carried out expeditiously." Even after the trial court set a date for execution, Simmons refused to exercise his unqualified right of appeal. The trial court subsequently conducted a hearing and found that Simmons was competent to waive his right to an appeal and that his decision on the waiver was knowingly and intelligently made. As the date for execution neared, Rev. Louis J. Franz petitioned this court to allow him to proceed in this Court on Simmons' behalf as next friend, asked for a stay of execution, and asked that we make appeal mandatory in death cases. We granted a stay of execution and asked the parties and the petitioner to file briefs on (1) whether the petitioner has standing; (2) whether this Court should change its rules to require mandatory review of death cases; (3) if there is no rule change to require mandatory review of death cases, whether a decision to waive appeal in a death case should be reviewed by this Court; and (4) if appeal may be waived, whether the defendant in this case

understood the choice of life or death and knowingly and intelligently made that choice. Briefs have been received and oral arguments have been heard on the issues.

1. Standing of Rev. Franz

[1] The requirements of next friend standing are twofold. *See, e.g., Davis* v. *Austin*, 492 F. Supp. 273 (N.D. Ga. 1980). The *Davis* court noted, "The petitioners must first meet the threshold requirement of showing they are 'next friends.' If that showing is made, petitioners must also demonstrate that a 'next friend' suit is maintainable because the person on whose behalf they act is incompetent." *Id.* at 275.

As to the first requirement, the qualification as a next friend, the *Davis* court noted:

> The case law does not establish an easily applied test as concerning the requirements for standing as "next friend." The cases establish that such actions may be appropriate in cases of infancy, lack of time, and incompetency. *United States* v. *Preiser*, 506 F.2d 1115, 1126 n.8 (2d Cir. 1974). Although the relationship and interest of the proposed "next friend" is to be considered by the court before it entertains such an action, the cases do not adequately define who might act as next friend. *See Weber* v. *Garza*, 570 F.2d 511 (5th Cir. 1978). The court must start with the proposition that members of the public in general do not have a right to intercede as "next friend" in an action such as this because they are morally or philosophically opposed to the death penalty. On the other end of the scale, close relatives, such as a parent, spouse, or sibling, who maintain a close personal relationship with the aggrieved, would be appropriate persons to maintain a "next friend" action.

Davis, 492 F. Supp. at 275.

The facts of the *Davis* case are similar to the facts in this case. One of the persons seeking "next friend" status in *Davis* was the Rev. Murphy Davis. The court noted:

> The testimony shows that Reverend Davis is an ordained Presbyterian minister and Director of the Southern Prison Ministry of Georgia. She is philosophically opposed to

> capital punishment. Reverend Davis has had some personal contact with [the defendant] over approximately one and a half years and has counseled with him on occasion. The evidence does not demonstrate that she is in any way his personal minister or religious adviser.

Id. The court held, "Although the court has no doubt as to the deep sincerity of Reverend Davis' convictions, her connection with [the defendant] is that of a concerned minister who has made herself available to assist him. Such a relationship is insufficient to confer upon her status as 'next friend.' " *Id.* at 275-76. The court then went on to quote Justice Rehnquist's concern expressed in an opinion written in the capacity of Circuit Justice: "[H]owever worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case." *Lenhard* v. *Wolff*, 443 U.S. 1306, 1312, *stay of execution denied*, 444 U.S. 807 (1979), *quoted in Davis*, 492 F. Supp. at 276.

[2] Rev. Franz's connection to Simmons is even more tenuous than the one in *Davis*. According to his petition, Rev. Franz is a Catholic priest who counsels inmates at the Arkansas Department of Correction. There is nothing in his petition to indicate that he is Simmons' minister, spiritual adviser, or confidant, or even less, that the two have ever met. We hold that Rev. Franz has failed to allege any facts to show that his relationship to Simmons is sufficiently close to give rise to next friend status, and we therefore cannot grant him standing on this basis.

[3, 4] Rev. Franz alternatively argues that even if he does not have standing as next friend, he has standing as a taxpayer under article 16, section 13 of the Constitution of Arkansas, the illegal exaction provision. The argument is without merit for at least two reasons. First, a suit to prevent an illegal exaction must be commenced in a trial court. Such a suit cannot be commenced in this appellate court. Second, the constitutional provision is not so broad that it gives one taxpayer the right to intervene in the merits of a criminal case against another person.

[5] Rev. Franz's last alternative argument is that if he is not granted standing in this case then important legal issues will

go unresolved at the appellate level. Even though this is true, it is not sufficient to give petitioner standing. In *Gilmore* v. *Utah*, 429 U.S. 1012 (1976), the Supreme Court of the United States terminated Gary Gilmore's stay of execution at his request. At the time, the constitutionality of the Utah death penalty statute had not been reviewed by either the Utah Supreme Court or the Supreme Court of the United States. Justice White noted in his dissent (which was joined by Justices Brennan and Marshall) that "there are substantial questions under *Furman* v. *Georgia*, 408 U.S. 238 (1972), about the constitutionality of the Utah death penalty statute. Because of Gary Gilmore's purported waiver of his right to challenge the statute, none of these questions was resolved in the Utah courts." *Gilmore*, 429 U.S. at 1017-18 (White, J., dissenting). Justice Blackmun also noted that the constitutional question was "not insubstantial." *Id.* at 1020 (Blackmun, J., dissenting). Chief Justice Burger (joined by Justice Powell) was unconcerned, noting, "Gilmore has not challenged the validity of the statute under which he was convicted, and there is no other party before this Court with requisite standing to do so." *Id.* at 1017 n.7 (Burger, C.J., concurring). The existence of the question was not sufficient to give a third person standing, and, therefore, the question went unresolved at the appellate level. Accordingly, we reject Rev. Franz's attempt to gain standing simply because of the existence of important legal issues which remain unresolved at the appellate level.

2. Mandatory Review

However, as has often been noted, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Gregg* v. *Georgia*, 428 U.S. 153, 188 (1976). Because of the punishment's uniqueness and irreversibility, we choose to state clearly the law in Arkansas regarding the waiver of appeal in death cases.

[6] The threshold question is whether an appeal is mandatory in cases involving a death sentence. We have said that it is not: "[T]here is no mandatory appellate review in Arkansas." *Collins* v. *State*, 261 Ark. 195, 211, 548 S.W.2d 106, 115, *cert. denied*, 434 U.S. 878 (1977).

[7] The next question is whether the lack of mandatory

appeal renders our law unconstitutional. We have held that it does not:

> It is urged, however, that our system does not meet *Gregg-Proffit-Jurek* standards necessary to avoid Eighth and Fourteenth Amendment prohibitions for lack of a mandatory appeal of a judgment imposing the death penalty and of appellate review which compares cases in which the death penalty has been imposed. [This is a reference to the standards set out in *Gregg* v. *Georgia*, 428 U.S. 153 (1976), *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Jurek* v. *Texas*, 428 U.S. 262 (1976).]
>
> We find nothing in any opinion, and certainly no majority, which supports a holding that there *must* be either a mandatory or automatic appeal of a judgment imposing the death penalty or that there *must* be appellate review which compares cases in which the death penalty has been imposed. . . .
>
> . . . It seems to us that the only actual requirement, even of the Stewart plurality, is that a *meaningful* appellate review is available to insure that death penalties are not arbitrarily, capriciously or freakishly imposed. The important question is whether the system creates a substantial risk of arbitrariness or caprice.
>
> . . . .
>
> The idea that in *Gregg*, *Proffit*, and *Jurek*, the United States Supreme Court has held that there must be a mandatory or automatic appeal from the imposition of the death penalty by a state trial court seems to have crumbled with the recent actions of the court in *Gilmore* v. *State of Utah*, 429 U.S. 1012, 97 S. Ct. 436, 50 L. Ed. 2d 632 (1976) . . . . If the Constitution of the United States requires that a state provide a mandatory appeal in such cases, we do not see how there can be a knowing and intelligent waiver of "any and all federal rights" [as was found in *Gilmore*] when there has been no appeal from the state trial court's judgment imposing the death sentence. [Gilmore, too, had waived his right of appeal under state law.]

Collins, 261 Ark. at 204-06, 548 S.W.2d at 111-12.

[8] To support his contention that appeals in death penalty cases are mandatory, the petitioner cites Ark. Code Ann. § 16-91-113(a) (1987) and Ark. R. Crim. P. 36.24. The statute provides, "The Supreme Court need only review those matters briefed and argued by the appellant, except that, where either a sentence for life imprisonment or death has been imposed, the Supreme Court shall review all errors prejudicial to the rights of the appellant." Rule 36.24 contains almost identical language. These provisions, along with Ark. R. Sup. Ct. 11(f), simply mean that this Court must make its own examination of the record when an appeal is taken in such cases; they do not mandate an appeal.

3. Waiver

We note, however, that when a defendant sentenced to death declines to exercise his unqualified right to appeal, we will not automatically acquiesce to his desire.

In *Collins*, we noted that "[t]he likelihood that a death penalty would be executed without such an appeal, in the absence of a knowing and intelligent waiver, is highly improbable." *Id.* at 211, 548 S.W.2d at 115. This language recently served as the basis for our decision in *Rameta* v. *State*, 294 Ark. 206, 740 S.W.2d 928 (1987) (per curiam). In *Rameta*, the defendant had been sentenced to death and wished to be executed. He petitioned us to dismiss his appeal. Relying on *Collins*, we held that such a defendant will not be allowed to forego an appeal unless the trial court, in its discretion, has determined that the defendant's decision has been knowingly and intelligently made. However, we left two questions unanswered in *Rameta*.

[9] The first question involves what standard is to be used by a trial court in determining whether a decision to waive appeal is knowing and intelligent. The federal standard seems to be "roughly equivalent to the standard used to determine competency to stand trial: the defendant will be competent unless he lacks sufficient 'capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.'" White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 863 (1987) (quoting *Rees* v. *Peyton*, 384 U.S. 312, 314 (1966) (per curiam)). This standard has been widely

criticized. *See, e.g.*, Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983); White, *supra*. We feel that Professor Welsh White correctly summarized the problem with the standard:

> The issue of competency is troubling. The present standard for competency to elect execution is roughly equivalent to the test for competency to stand trial. But the decisions involved in the two situations are entirely different. When competency to stand trial is at issue, the court is required to determine whether the defendant understands the charges against him and has the capacity to communicate effectively with his attorney. When competency to elect execution is involved, the issue is whether the defendant has the capacity to choose between life and death. The focus should be upon not only the defendant's ability to understand the basic issue but also upon his ability to resolve it knowingly and voluntarily. Defense attorneys who specialize in capital cases claim that many capital defendants who have an adequate understanding of the charges against them and are fully competent to communicate with counsel should nevertheless be barred from electing execution because they lack either the judgment or the emotional stability to make a firm and stable decision, much less an informed one.

White, *supra*, at 867 (footnotes omitted). We adopt this higher criterion for declining to exercise the right to appeal in a capital case. Therefore, in Arkansas, a defendant sentenced to death will be able to forego a state appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence.

[10-12] The second question unanswered by *Rameta* is whether this Court must review a lower court's determination on the issue of the waiver of an appeal in a capital case. We hold that we must. In future cases, when a lower court has made a determination that a capital defendant can make a knowing and intelligent waiver of appeal, and has done so, the State has the burden of bringing the record of the lower court proceeding on

this issue to this Court for review. The record on this issue should, if possible, be lodged in this Court after the time for appeal has lapsed, but, in any event, it must be lodged at least seven days before the execution date. We will then review the proceeding to determine whether the defendant had the capacity to understand the choice between life and death and to knowingly and intelligently waive his rights to appeal his sentence of death. The standard of review, as in other types of criminal cases, is whether the trial judge's conclusion is clearly erroneous. *See Rector* v. *State*, 277 Ark. 17, 638 S.W.2d 672 (1982).

In this case the trial judge found that the defendant made a rational choice and knowingly and intelligently waived his right to an appeal. That finding is not clearly erroneous.

Not only has the defendant failed to exercise his unqualified right to appeal, but, in addition, after being sentenced, affirmatively stated:

> [I]t is my wish and my desire that absolutely no action by anybody be taken to appeal or in any way change this sentence.
>
> It is further respectfully requested that this sentence be carried out expeditiously. I want no action that will delay, deny, defer or denounce this very correct and proper death sentence.
>
> My attorneys have repeatedly counseled me to appeal. However, that is not what I want. I believe now, and always have, in the death penalty. To those who oppose the death penalty, I say in my particular case anything short of death would be cruel and unusual punishment.
>
> I am of sound mind and body and have been seen by psychoanalysts, who can verify that I am capable of making a clear and rational decision. I have given clear and careful thought and consideration so there is nothing that will cause me to change my mind. I only ask for what I deserve. Let the torture and suffering end. Please allow me the right to be at peace.

At the same time his attorneys gave an affidavit in which they said he is "sane, rational, responsible and able to make his

own decisions."

At a subsequent hearing on his competency to waive appeal, Dr. Lew Neal, a highly qualified psychiatrist hired by the defense attorneys, testified and gave an affidavit which together unequivocally state that Simmons understands the consequences of his choice, is capable of making a rational decision, and is doing so freely and voluntarily.

Dr. Irving Kuo, a psychiatrist with the State Hospital, which is an agency independent of the prosecutor, see *Parker* v. *State*, 292 Ark. 421, 433, 731 S.W.2d 756, 762 (1987), examined Simmons during a sixty day evaluation before the trial and examined him for an hour and a half after the trial. He testified that Simmons understands the consequences of his choice and has made his choice knowingly. The key questions by the trial court and the decisive answers by Dr. Kuo are as follows:

> Q. Of course, the conclusion that the Court has to reach today is not necessarily whether the Defendant appreciated the criminality of his conduct or that he was able to assist his attorneys. What I am required to do now is make a decision as to whether he can knowingly and intelligently waive his right to appeal his conviction. Do you have an opinion along those lines?
>
> A. Yes, I do.
>
> Q. Have you discussed this with Mr. Simmons?
>
> A. Yes, I have.
>
> Q. Do you feel that he is capable of making a decision that is knowingly and intelligently arrived at?
>
> A. Yes, I do.
>
> Q. What is the basis of your opinion?
>
> A. Okay. During the hour and a half that I spoke with him I tried to retrace a little bit of history since the last time I saw him; and basically I conducted an interview for about ninety minutes and touched on a number of topics, including one about the sentencing and his desire to waive the—
>
> Q. The appeal process?

A. —waive the appeal process; and in the course of that, I tried to get a feel of how he was today. I did what we call a mental status examination, which basically is a snapshot of—which basically is a snapshot of his psychiatric or mental condition right at the time that I interviewed him. My assessment was that he looked very much like he did during the two months that I had seen him earlier this year. There was no evidence of any psychotic process. His thinking was goal-directed, was relevant, logical. He seemed able to make an intelligent decision that was not interfered by—that didn't have any interference by any kind of psychiatric problem that I could detect.

Q. Do you feel that Mr. Simmons is under any pressure or anything that's causing him to take this position?

A. Well, I think that Mr. Simmons has some internal pressure in terms of wanting to waive the particular appeal process. I don't think there is any external pressure from any outside source. I think that in spite of the conviction he comes across as an extremely moralistic very rigid gentleman who has some real rigid ideas about right and wrong and his own statement was that the punishment needs to fit the crime and he felt that this was, you know, an appropriate and proper decision, the one that came down on Thursday; and he seemed to think that it was quite proper. He seemed to indicate that he knew what he did. He indicated that it was in a somewhat premeditated fashion and that he felt that the punishment should fit the crime. He told me that he does believe in capital punishment.

At the conclusion of this hearing the trial court found that Simmons was competent to waive his right to an appeal.

One month later a competency hearing was held at the request of the petitioner, Rev. Franz. At that hearing the state hospital psychiatrist, Dr. Kuo, modified his opinion.

Dr. Kuo stated that his modified opinion came about as follows: He wrote to the defendant and said he would like to have another interview in order to obtain information for publication in a professional journal. The defendant responded and in the first

sentence of the fifth paragraph wrote: "Evidence is beginning to surface to indicate that officials are starting to play their little games." Dr. Kuo testified that one sentence "can hint towards" psychosis and therefore he had "some doubt as to whether that opinion [his original opinion] was correct." At another time he said he had a "doubt," not just "some doubt," about his original opinion.

Dr. Kuo testified that his original opinion was given after sixty days of personal observation, not only by himself but by an evaluation team. He admitted that he had not talked to the defendant since his first opinion and admitted that no other member of the evaluation team was present to testify as to any doubt. Significantly, the petitioner did not attempt to call the defendant's own psychiatrist.

Simmons took the stand and testified that he did not want Rev. Franz or anyone else to serve as his next friend.

The trial court again found Simmons competent to waive his right to appeal. The ruling is not clearly erroneous.

The trial court was in a position to observe the testimony of Dr. Kuo and the defendant. The Supreme Court of the United States has stated:

> In *United States* v. *Oregon Medical Society*, 343 U.S. 169 (1952), commenting on the deference which this Court gave to the findings of a District Court on direct appeal from a judgment in a bench trial, we stated:
>
> > "As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd* v. *Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634." *Id.*, at 339.

Marshall v. *Lonberger*, 434 U.S. 422, 434 (1983).

[13] Dr. Kuo did not retract his statement that the defendant was competent; he only stated that he had doubts about his original opinion. His original opinion was given based upon sixty days observation coupled with an hour and a half interview at the time of the first opinion. The doubt about that opinion was not created by a first-hand interview but by one sentence in a full-page letter. No other member of the evaluation team testified. Neither Dr. Neal, the defendant's psychiatrist, nor the defense attorneys have retracted in any manner their statements that Simmons is competent to waive his right to appeal. Accordingly, we affirm the trial court's ruling that the defendant is competent to waive his unqualified right to appeal.

We hold that Rev. Franz does not have standing and that the defendant understands the choice of life and death and has made a knowing and intelligent waiver of his right to appeal. Accordingly, the stay of execution which we granted on June 20, 1988, is hereby terminated. Since Rev. Franz does not have standing, he does not have standing to file a petition for rehearing. Therefore, the mandate is ordered to be issued at the time this opinion is handed down.

HAYS, J., dissents.

GLAZE, J., concurs in part and dissents in part.

TOM GLAZE, Justice, concurring in part and dissenting in part. I agree with the majority that Reverend Louis J. Franz has no standing to pursue an appeal on behalf of Ronald Gene Simmons. While this court is confronted for the first time with the standing and competency issues in a death penalty situation, those issues have been considered and decided in numerous cases in other jurisdictions. *See Smith, Mo. Public Defendant Comm'n* v. *Armontrout*, 812 F.2d 1050 (8th Cir. 1987); *Lovelace* v. *Lynaugh*, 809 F.2d 1136 (5th Cir. 1987); *Rumbaugh* v. *McKaskle*, 730 F.2d 291 (5th Cir. 1984); *Hays* v. *Murphy*, 663 F.2d 1004 (10th Cir. 1981); *Davis* v. *Austin*, 492 F. Supp. 273 (N.D. Ga. 1980); *State* v. *Hightower*, 214 N.J. Super 43, 518 A.2d 482 (1986); and *State* v. *Bailey*, 519 A.2d 132 (Del. Super. Ct. 1986). All of the foregoing decisions cite *Gilmore* v. *Utah*, 429 U.S. 1012 (1976), and in relying on *Gilmore*, those courts have either

generally, or specifically, adhered to the proposition that a defendant who has been sentenced to death can make a competent, knowing and intelligent choice to abandon further litigation, and when that choice is made, it will be honored by the courts. In each of the cases set out above, the court, quoting from *Rees* v. *Peyton*, 384 U.S. 312 (1966), posed the critical issue as follows: "Whether the defendant has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." If the defendant is determined to be competent, then a next friend has no standing to pursue further proceedings when the defendant chooses not to proceed.

In the present case, the trial judge held hearings to determine Simmons's competency, and after analyzing considerable evidence and testimony, the judge found Simmons had the capacity to waive his right to an appeal. It is this court's duty to review the lower court's findings under the clearly erroneous standard. *Cf. Smith, Mo. Public Defendant Comm'n*, 812 F.2d at 1058. The majority opinion details much of the testimony taken during the hearings bearing on the competency issue, and I thoroughly agree with the finding that the trial judge's decision is not clearly erroneous.

In reaching its decision, the majority concludes that this court must review a lower court's determination on the issue of the waiver of an appeal in a capital case. While the court gives no basis for its holding, I have no doubt that such a decision is required by the Supreme Court's holding in *Gilmore*. It is really unimportant why the majority has decided that an appellate review is necessary in order to examine the waiver issue in capital cases, but once the majority did so, I believe it should have expanded such a review to include the sentencing stage of a defendant's trial. My reasons for suggesting such a review are several.

First, the Supreme Court has not yet decided the issue as to whether a defendant has the power to waive the right to a state appellate review. *Gilmore*, 429 U.S. at 1017 (Burger, C.J., concurring). Instead, the Supreme Court in *Gilmore* merely

reviewed the record bearing on Gilmore's competency and decided his mother did not have standing to speak for him. I believe the Supreme Court's holding implicitly requires that an appellate review be given in such competency matters. However, little more can be gleaned from the *Gilmore* decision. As a consequence, the Supreme Court—as well as this court—must still decide whether appellate reviews are mandated in capital cases. This court in *Collins* v. *State*, 261 Ark. 195, 548 S.W.2d 106 (1977), discussed this very issue and by a four-to-three vote, the majority concluded that a mandatory or automatic appeal of a judgment imposing the death penalty is not required. Justice George Rose Smith wrote a persuasive dissenting opinion asserting that a mandatory review should be provided. Nothing more on the subject has been done by either this court or the General Assembly, and the Supreme Court has not reached or conclusively decided whether such appeals are mandated by the Constitution.

In addition to the fact that a substantial constitutional question still remains unresolved concerning the question of mandatory review, Arkansas, and perhaps Ohio, are the only states that have no specific provisions for an automatic review of capital cases. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Bull., *Capital Punishment, 1986* (Sept. 1987).[1] Although Ohio has been noted as a state that does not provide for an automatic review, the case of *State* v. *Brooks*, 25 Ohio St. 3d 144, 495 N.E.2d 407 (1986), lends some argument to the contrary. While such issue was not specifically addressed in *Brooks*, it is important to note that Brooks's motion to withdraw his appeal of the death sentence was denied by the Ohio appellate court even though the record reflected Brooks was competent to stand trial.[2] After denying Brooks's motion, the Ohio Court of Appeals, and later the Ohio Supreme Court, reviewed Brooks's death sentence in detail, concluding that the sentence was proper. In sum, out of the thirty-seven states that provide for the death penalty, thirty-

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[1] This Bulletin recites Arkansas, Florida, Ohio and Vermont have no such provisions but both Florida and Vermont have since amended their laws to provide mandatory reviews.

[2] Apparently the Ohio courts never required a hearing (or found one was necessary) to determine whether Brooks was competent to waive his right of appeal.

SUPREME COURT OF ARKANSAS

No. CR89-45

MAR 10 1989

RONALD GENE SIMMONS, PETITIONER, V. STATE OF ARKANSAS, RESPONDENT.	PETITION REQUESTING EXPEDITED REVIEW OF WAIVER OF DIRECT APPEAL IN A CAPITAL MURDER CASE IN WHICH THE DEATH PENALTY WAS IMPOSED PETITION GRANTED

Per Curiam

The petitioner, Ronald Gene Simmons, has filed his petition requesting expedited review of his waiver of direct appeal. On February 10, 1989, a Johnson County jury convicted the petitioner of capital murder and sentenced him to death by lethal injection, on March 16, 1989, at 7:00 o'clock a.m. Following the trial, the petitioner notified the trial judge of his desire to waive his appeal and after an evidentiary hearing held on March 1, 1989, the trial judge found the petitioner was competent to waive his right to a direct appeal. In accordance with this court's decision in Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988), petitioner now submits to this court a transcript of the lower court's proceedings along with his petition, and requests we review those proceedings in accordance with the rule established in the Franz case. After careful review of those lower court proceedings, we grant petitioner's request.

In Franz, we held that when a defendant sentenced to death declines to exercise his unqualified right to appeal, we will not automatically acquiesce to his desire. We stated that a defendant sentenced to death will be able to forego an appeal only if he has been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive any and all rights to appeal his sentence. This court further held that we must review a lower

court's determination on the issue of the waiver of an appeal in a capital case, and that the state has the burden of bringing the lower court's record on this issue to this court for review. We added that the record must be lodged at least seven days before the execution date. All of these requirements have been met.

In sum, we would note that the trial court considered, and made a part of this proceeding, the same psychological evaluations that were introduced in Franz. Since those evaluations were alluded to in detail there, we need not reiterate those findings in this opinion. In addition, the trial court added to the record before us a forensic evaluation which was filed in a proceeding before the United States District Court, Eastern District of Arkansas. The federal court proceeding concerned the issue of whether Mr. Simmons was presently competent to waive habeas corpus relief. From our review of this recent forensic evaluation, we find nothing that diminishes in any way the earlier psychological evaluations submitted in the state proceedings.

The trial judge and petitioner's counsel performed an exceptional job in examining and exploring the petitioner's capacity to understand the choice between life and death and his ability to know and to intelligently waive any and all rights he might have in an appeal of his sentence. In addition, petitioner's counsel thoroughly discussed seven possible points that could be argued for reversal on appeal, and petitioner responded by stating he understood those points and that he rejected all encouragement and suggestions to appeal. Petitioner further acknowledged that the execution date was set for March 16, 1989, and that he had thirty days in which to appeal his conviction judgment.

After a careful review of the record and exhibits, we affirm the trial court's decision that the petitioner has

knowingly and intelligently waived his right to appeal. Accordingly, we direct that this court's mandate be issued at the time this opinion is handed down.

HAYS, J., dissents for the reasons stated in Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988).

SUPREME COURT OF ARKANSAS

No. CR89-45

MAR 13 1989

RONALD GENE SIMMONS, PETITIONER, V. STATE OF ARKANSAS, RESPONDENT.	MOTION TO INTERVENE AND FOR STAY OF EXECUTION MOTION DENIED

Per Curiam

Petitioner has failed to show that he has standing to intervene in this cause. Franz v. State, 296 Ark. 181, 754 S.W.2d 839 (1988).

five of them require an automatic review. As pointed out, the Ohio courts, representative of one of the two states that have no automatic review requirement, have failed to address the issue directly, but instead opted to review a capital case even after the defendant (who was found competent to stand trial) sought to abandon his right of appeal. Thus, by the majority's opinion Arkansas becomes the only state that actually has chosen not to review a death penalty case.

Another reason for requiring reviews in death penalty situations is reflected in this state's present laws. Arkansas's laws clearly provide that great scrutiny be given death penalty cases before a defendant is executed. For example, in capital felony murder cases, a separate phase of the trial is required for sentencing, at which evidence relating to aggravating or mitigating circumstances may be presented to the same jury that found the defendant guilty of the crime. Ark. Code Ann. § 5-4-602 (1987). The jury is authorized to impose the death sentence only if it unanimously returns written findings that the aggravating circumstances exist beyond a reasonable doubt, that the aggravating circumstances outweigh all mitigating circumstances, and that the aggravating circumstances justify a sentence of death beyond a reasonable doubt. Ark. Code Ann. § 5-4-603 (1987). Also, this court has held that the review of capital cases with death sentences requires the court to consult prior cases as precedent in order to determine whether there was error in the sentencing procedure, whether the evidence was sufficient to support any finding made by the jury, whether any of the findings were the result of passion or prejudice or other arbitrary factors and whether there was an abuse of discretion of either the jury or the trial judge in imposing sentence. *Collins*, 261 Ark. at 221, 548 S.W.2d at 212. Furthermore, this court is mandated under A.R.Cr.P. Rule 36.24 and Ark. Sup. Ct. R. 11(f) to review the entire record for errors prejudicial to the right of the appellant. Obviously, without mandatory appellate review, none of the foregoing legal requirements can be measured when a defendant chooses to waive his right to appeal—which leads me to the final reason why I believe the appellate review of a defendant's sentence should be required.

In my view, no criminal defendant, including Simmons in this cause, should dictate this state's policy concerning whether

death sentences should be reviewed. The question posed in these cases in no way involves the constitutionality of the death penalty itself. The courts are, however, confronted with the various constitutional and statutory requirements needed to be complied with when imposing the death penalty.

In a number of cases cited earlier in this opinion, the criminal defendants often changed their minds during their trials or appeals as to whether they desired to abandon or continue their rights of appeal. Obviously, such changes in attitude can be expected, but those changes also lead to extensions and delays in the judicial process. This court can avoid such delays by taking charge of this state's appellate process and requiring that in every capital case where the death penalty has been imposed, the court will automatically review the lower court's record of the *sentencing phase* of the trial.

The majority has—as I believe *Gilmore* requires—provided for review of any competency hearing required when a defendant chooses to waive his or her right of appeal. In the present case, a little more than two months have transpired between Simmons's competency hearing and this court's final review of that hearing. In my estimation, no delay would have been added if this court had reviewed the sentencing stage of Simmons's trial. By adopting such a review procedure, the court would allow any defendant to waive his right of appeal concerning his guilt, but at the same time, the state's highest court would provide a prompt review concerning whether the death penalty was constitutionally and appropriately imposed. This would ensure the scrutiny of death penalty cases that our law mandates.

Because Arkansas's present procedure is, in my view, constitutionally suspect, this court could avoid those constitutional questions and potential pitfalls by reviewing the sentence phase of death penalty cases. Such a review would, at the same time, provide a more expeditious manner by which such capital cases may be disposed. Certainly, such a review procedure would place the process of review of capital cases in the control of the state's judiciary, as it should be, rather than at the impulse or whim of a defendant.

STEELE HAYS, Justice, dissenting. While I concur in the majority view that the Reverend Louis J. Franz lacks standing to

act as next friend for Ronald Gene Simmons, I would adopt a rule for mandatory appellate review and apply it to this case.

I concede there is no express provision in our law for mandatory appeal, but it is at least arguable that our law now implicitly provides for mandatory review by this court in cases in which a sentence of death is imposed. While dictum to the contrary appears in *Collins* v. *State*, 261 Ark. 195, 211, 548 S.W.2d 106 (1966), that was not the holding and certainly does not prevent our adopting a rule for mandatory review in death cases. Moreover, in *Collins* this court committed itself to a proportional review where death is imposed on the defendant. Our Rule 11(f), adopted pursuant to Act 333 of 1971, states that "when the sentence is death or life imprisonment, the court *must* review all errors prejudicial to the appellant." (My emphasis). Additionally, in *Wicks* v. *State*, 270 Ark. 781, 606 S.W.2d 366 (1980), we said that in a capital case if the trial court fails to instruct the jury that it has the option of returning a lesser penalty than death, that is reversible even in the absence of an objection. Keeping faith with *Wicks*, *Collins*, and Rule 11(f), mandates, I submit, appellate review of the entire record in death cases.

But whether the law now provides for mandatory appeal is beside the point, as it is plainly within the rule making power of this court to effectuate such a rule to operate immediately. If we can change our rule in a civil case to affect pending litigation, as we did in *Ford Motor Credit Co.* v. *Nesheim*, 287 Ark. 78, 696 S.W.2d 732 (1986),[1] we can certainly do so where the death sentence is involved.

The adoption of such a rule, as I envision it, simply means that, notwithstanding a waiver of appeal by the defendant, this court, on information from either the Attorney General or the trial court, that a death sentence has been imposed, would issue a writ of certiorari for the record and appoint counsel to argue any errors prejudicial to the defendant. The unique severity of the death sentence and the public interest in its imposition demand nothing less.

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[1] On March 18, 1985, we amended Rule 2(a)(9) of the Rules of Appellate Procedure to permit an appeal by *Ford Motor Credit Co.* from an order of the trial court certifying the case as a class action.

The public's interest and right to having a review of a death sentence is discussed in Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 Harv. C.R.-C.L. L. Rev. 483 (1983) (footnotes omitted):

> The societal interest in ensuring that capital punishment is fairly imposed is too great to allow execution without the appellate scrutiny required by the eighth amendment
>
> . . . .
>
> It is also inappropriate to grant complete power to a defendant's waiver when that choice will infringe upon the constitutional rights of other citizens. The [Supreme] Court recognized this limitation on waiver in *Richmond Newspapers* v. *Virginia*, by holding that the first amendment rights of reporters and others to be present at a criminal trial outweighed a defendant's waiver of a public trial. Similarly, an attempt to force execution by the state prior to the resolution of inquiries required by the Constitution violates that document's protection of the public from abuse of state power.
>
> Finally, statutory and judicial restrictions upon the ability of a capital defendant to decide whether to be present at trial or to pursue review of a sentence—decisions not generally based on specific constitutional protections—reflect the understanding that the death penalty is a matter of public as well as individual concern.

I do not question the right of a competent defendant to refrain from participating in an appeal, or to deny others the right to act in his behalf. But that right does not empower a defendant to by-pass appellate review any more than he could by-pass a trial or, if a plea of guilty is entered, a hearing on the guilty plea. These steps are basic, and where the sentence is death, appellate review is equally basic. By rejecting the opportunity to adopt a rule of mandatory review the majority has put Arkansas at odds with all but one of the thirty-seven states which have the death penalty, not an enviable position, and not one likely to endure.

5-4-601. Legislative intent.

(a) It is the intention of the General Assembly of the State of Arkansas, in enacting this subchapter, to specify the procedures and standards pursuant to which a sentencing body must conform in making a determination as to whether a sentence of death is to be imposed upon a conviction of capital murder.

(b) In the event that the provisions of this subchapter respecting sentencing procedures are held invalid with regard to the imposition of a sentence of death or a sentence of death is declared to be invalid per se, it is the intent of the General Assembly that:

(1) Capital murder shall be punishable by life imprisonment without parole; and

(2) The procedures and findings required by §§ 5-4-602 — 5-4-605, 5-4-607, and 5-4-608 shall be deemed repealed and of no effect.

History. Acts 1975, No. 280, § 1308; A.S.A. 1947, § 41-1308.

5-4-602. Capital murder charge — Trial procedure.

The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subdivision (4) hereof, and to determine sentence in the manner provided by § 5-4-603; except that, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in § 5-4-604 or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of evidence relevant to the aggravating circumstances set forth in § 5-4-604 shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing.

History. Acts 1975, No. 280, § 1301; A.S.A. 1947, § 41-1301.

5-4-603. Findings required for death sentence — Unanimity.

(a) The jury shall impose a sentence of death if it unanimously returns written findings that:

(1) Aggravating circumstances exist beyond a reasonable doubt; and

(2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and

(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

(b) The jury shall impose a sentence of life imprisonment without parole if it finds that:

(1) Aggravating circumstances do not exist beyond a reasonable doubt; or

(2) Aggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist; or

(3) Aggravating circumstances do not justify a sentence of death beyond a reasonable doubt.

(c) If the jury does not make all findings required by subsection (a), the court shall impose a sentence of life imprisonment without parole.

(b) If the execution of the sentence of death as provided in subsection (a) is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by electrocution in a manner determined by the Director of the Department of Correction.

(c) Nothing in this section is to be construed as a declaration by the Arkansas General Assembly that death by electrocution constitutes cruel and unusual punishment in violation of the Constitutions of the United States or the State of Arkansas.

5-10-101. Capital murder.

(a) A person commits capital murder if:

(1) Acting alone or with one (1) or more other persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life; or

(2) With the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, firefighter, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person; or

(3) With the premeditated and deliberated purpose of causing the death of any person, he causes the death of two (2) or more persons in the course of the same criminal episode; or

(4) With the premeditated and deliberated purpose of causing the death of the holder of any public office filled by election or appointment or a candidate for public office, he causes the death of any person; or

(5) While under sentence of life imprisonment, life imprisonment without parole, or death, he purposely causes the death of another person after premeditation and deliberation; or

(6) Pursuant to an agreement that he cause the death of another person in return for anything of value, he causes the death of any person; or

(7) He enters into an agreement whereby one person is to cause the death of another person in return for anything of value, and the person hired, pursuant to the agreement, causes the death of any person.

(b) It is an affirmative defense to any prosecution under subsection (a)(1) of this section for an offense in which the defendant was not the only participant that the defendant did not commit the homicidal act or in any way solicit, command, induce, procure, counsel, or aid its commission.

(c) Capital murder is punishable by death or life imprisonment without parole pursuant to §§ 5-4-601 — 5-4-605 and 5-4-607 — 5-4-609. For all purposes other than disposition under §§ 5-4-101 — 5-4-104, 5-4-201 — 5-4-204, 5-4-301 — 5-4-308, 5-4-310 — 5-4-312, 5-4-401 — 5-4-404, 5-4-501 — 5-4-505, 5-4-601 — 5-4-605, and 5-4-607 — 5-4-609, capital murder is a Class Y felony.

RULE 36.1. Right of Appeal.

Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas. An appeal may be taken jointly by co-defendants or by any defendant jointly charged and convicted with another defendant, and only one (1) appeal need be taken where a defendant has been found guilty of one (1) or more charges at a single trial. Except as provided by Rule 24.3(b) there shall be no appeal from a plea of guilty or nolo contendre [contendere]. [Amended by Per Curiam July 13, 1987, effective October 1, 1987.]

RULE 36.24. Matters to Be Considered on Appeal.

The Supreme Court need only review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant.

RULE 36.25. Action to Be Taken on Appeal.

A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution, the laws of Arkansas or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed.

RULE 36.26. Trial Counsel's Duties with Regard to Appeal.

Trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court, unless permitted by the trial court or the Arkansas Supreme Court to withdraw in the interest of justice or for other sufficient cause.

Rule 11.

ABSTRACTS AND BRIEFS, CRIMINAL CASES

(f) Appellant's Duty to File Abstract and Brief. — In all felony cases it is the duty of the appellant, whether he is represented by retained counsel, appointed counsel, or a public defender, or acts pro se, to abstract such parts of the record, but only such parts of the record, as are material to the points to be argued in his brief. (The former requirement that the Attorney General supply an abstract in felony cases no longer obtains.) The argument portion of the appellant's brief shall not exceed 25 double-spaced typewritten pages or 30 printed pages, with a similar 15 typewritten and 20 printed page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case it may be waived by the Court on Motion. See paragraph (g) of this Rule with respect to the printing of an indigent's abstract and brief. The State's brief shall be subject to the same page limit.

When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant. Act 333 of 1971; Ark. Stat. Ann. § 43-2725 (Supp. 1973). To make that review possible the appellant must abstract all objections that were decided adversely to him in the trial court, together with such parts of the record as are needed for an understanding of the objection. The Attorney General will make certain that all objections have been so abstracted and will brief all points argued by the appellant and any other points that appear to him to involve prejudicial error.

(g) Printing of Abstracts and Briefs for Indigent Appellants. — When an indigent appellant is represented by appointed counsel or a public defender, his attorney may have the abstract and briefs printed by submitting the double-spaced typewritten manuscript to the Attorney General not later than the due date of the brief.

(h) Withdrawal of Counsel. — Any motion by counsel for a defendant in a criminal case for permission to withdraw made after notice of appeal has been given shall be addressed to this court, shall contain a statement of the reason for the request, and shall be served upon the defendant appealing. A request to withdraw on grounds that the appeal is wholly without merit shall be accompanied by a brief referring to anything in the record that might arguably support the appeal, together with a list of all objections made by the appellant and overruled by the court and of all motions and requests made by the appellant and denied by the court, accompanied by a statement as to the reason counsel considers that the points thus raised would not arguably support the appeal. The brief may be typewritten if counsel is representing an indigent person by appointment, as in other cases. The Clerk of this court shall furnish the appellant with a copy of his counsel's brief, and advise the appellant that he has 30 days within which to raise any points that he chooses and that this may be done in typewritten or hand-printed form and accompanied by his affidavit that he has not received any assistance from any inmate of the Department of Correction or of any other place of incarceration in the preparation of this response. The Clerk shall see that such responses by an appellant are served on the Attorney General who shall proceed to file his brief on behalf of the state pursuant to sections [subsections] (f) and (g) of this rule within 30 days after such service and to serve a copy of his brief on the appellant as well as on appellant's counsel. After a reply brief has been filed or after the time for filing such a brief has expired, the motion for withdrawal shall be submitted to the court as other motions are submitted. If, upon consideration of the motion, it shall appear to the court that the judgment of the trial court should be affirmed or reversed, the court may take such action on its own motion, without any supporting opinion. [Amended October 28, 1974; September 8, 1975; October 1, 1975; November 1, 1975; March 26, 1979; December 17, 1979; January 28, 1980; April 27, 1981; July 7, 1986.]

FILED

MAR 13 1989

LESLIE W. STEEN
CLERK

THIS IS A CAPITAL CASE AND
EXECUTION DATE IS IMMINENT

IN THE SUPREME COURT OF ARKANSAS

JONAS H. WHITMORE INDIVIDUALLY AND
AS NEXT FRIEND OF RONALD GENE SIMMONS — PETITIONERS

VS — NO. CR 89-45

STATE OF ARKANSAS — RESPONDENT

MOTION TO INTERVENE AND
FOR STAY OF EXECUTION

Comes Jonas H. Whitmore individually and as next friend of Ronald Gene Simmons and for his Motion To Intervene And For Stay of Execution, states:

1. Ronald Gene Simmons is an inmate on Arkansas death row whose execution is scheduled for March 16, 1989.

2. Jonas H. Whitmore is an inmate on Arkansas death row who is seeking permission to intervene as next friend of Ronald Gene Simmons.

3. There are important constitutional issues including the requirement of a constitutionally mandated appellate review in any capital case and Petitioner Whitmore intends to seek a writ of certiorari to the United States Supreme Court to review this question.

4. The execution date of Ronald Gene Simmons is so imminent that unless a stay of execution is granted by this Court, the important constitutional issues cannot be addressed through further legal action.

5. The Petitioner Jonas H. Whitmore is an interested party in that certain protected rights for both he and other present and future death row inmates are dependent upon further appellate review in behalf of Ronald Gene Simmons.

WHEREFORE, Jonas H. Whitmore acting individually and as next friend for Ronald Gene Simmons respectfully prays that he be allowed to intervene in this case for the purpose of seeking a writ of certiorari in the United States Supreme Court and that this Court grant a stay of execution of the March 16, 1989

execution date for Ronald Gene Simmons.

Respectfully submitted,

ARTHUR L. ALLEN
Allen & O'Hern
1700 First Commercial Building
Little Rock, Arkansas 72201
(501) 375-5040

COUNSEL FOR PETITIONER,
PRO BONO PUBLICO

CERTIFICATE OF SERVICE

I, Arthur L. Allen, do hereby certify that a true and correct copy of the foregoing application was served by hand delivery upon the Hon. Steve Clark, Attorney General of Arkansas, 200 Tower Building, Little Rock, Arkansas 72201, on this 13th day of March, 1989.

Arthur L. Allen

5-4-604. Aggravating circumstances.

Aggravating circumstances shall be limited to the following:

(1) The capital murder was committed by a person imprisoned as a result of a felony conviction;

(2) The capital murder was committed by a person unlawfully at liberty after being sentenced to imprisonment as a result of a felony conviction;

(3) The person previously committed another felony, an element of which was the use or threat of violence to another person or the creation of a substantial risk of death or serious physical injury to another person;

(4) The person in the commission of the capital murder knowingly created a great risk of death to a person other than the victim;

(5) The capital murder was committed for the purpose of avoiding or preventing an arrest or effecting an escape from custody;

(6) The capital murder was committed for pecuniary gain; or

(7) The capital murder was committed for the purpose of disrupting or hindering the lawful exercise of any government or political function.

(8) The capital murder was committed in an especially heinous, atrocious, or cruel manner.

5-4-605. Mitigating circumstances.

Mitigating circumstances shall include, but are not limited to, the following:

(1) The capital murder was committed while the defendant was under extreme mental or emotional disturbance;

(2) The capital murder was committed while the defendant was acting under unusual pressures or influences or under the domination of another person;

(3) The capital murder was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, intoxication, or drug abuse;

(4) The youth of the defendant at the time of the commission of the capital murder;

(5) The capital murder was committed by another person and the defendant was an accomplice and his participation relatively minor;

(6) The defendant has no significant history of prior criminal activity.

5-4-606. Life imprisonment without parole.

A person sentenced to life imprisonment without parole shall be remanded to the custody of the Department of Correction for imprisonment for the remainder of his life and shall not be released except pursuant to commutation, pardon, or reprieve of the Governor.

5-4-607. Application for executive clemency — Regulations.

(a) The pardon of a person convicted of a capital murder, or the commutation of a sentence of a person so convicted may be granted only in the manner provided herein:

(1) Copies of the application for pardon or commutation shall be filed with:

(A) The Secretary of State;

(B) The Attorney General;

(C) The sheriff of the county in which the offense was committed;

(D) The prosecuting attorney of the judicial district in which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such prosecuting attorney; and

(E) The circuit judge presiding over the proceedings at which the applicant was found guilty and sentenced, if still in office, and, if not, the successor of such circuit judge.

(2) The application shall set forth the grounds upon which the pardon or commutation is asked and shall be published by two (2) insertions, separated by a minimum of seven (7) days, in a newspaper of general circulation in the county or counties in which the offense or offenses of the applicant were committed;

(3) On granting the application, the Governor shall include in his written order the reasons therefor, and shall file with each house of the General Assembly a copy of his order which shall state the applicant's name, the offense of which he was convicted and sentence imposed, the date of the judgment imposing the sentence, and the effective date of the pardon or commutation.

(b) A person sentenced to death or to life imprisonment without parole shall not be eligible for parole and shall not be paroled.

(c) If the sentence of a person sentenced to death or life imprisonment without parole is commuted by the Governor to a term of years, such person shall not be paroled, nor shall the length of his incarceration be reduced in any way to less than the full term of years specified in the order of commutation or in any subsequent orders of commutation.

(d) Reprieves may be granted as presently provided by law.

History. Acts 1975, No. 280, § 1306; 1977, No. 474, § 13; A.S.A. 1947, § 41-1306.

5-4-608. Waiver of death penalty.

(a) If a defendant is charged with capital murder, the prosecuting attorney, with the permission of the court, may waive the death penalty.

(b) In such cases, if the defendant pleads guilty to capital murder or is found guilty of capital murder after trial to the court or to a jury, the trial court shall sentence the defendant to life imprisonment without parole.

History. Acts 1975, No. 280, § 1307; 1977, No. 474, § 14; A.S.A. 1947, § 41-1307.

5-4-609 — 5-4-614. [Reserved.]

5-4-615. Conviction — Punishments.

A person convicted of a capital offense shall be punished by death by lethal injection or by life imprisonment without parole pursuant to this subchapter.

5-4-616. Procedures following remand of capital case after vacation of death sentence — Retroactive application.

Notwithstanding § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the following shall apply:

(1) Upon any appeal by the defendant where the sentence is of death, the appellate court, if it finds prejudicial error in the sentencing proceeding only, may set aside the sentence of death and remand the case to the trial court in the jurisdiction in which the defendant was originally sentenced. No error in the sentencing proceeding shall result in the reversal of the conviction for a capital felony. When a capital case is remanded after vacation of a death sentence, the prosecutor may:

(A) Move the trial court to impose a sentence of life without parole, and the trial court may impose such sentence without a hearing;

(B) Move the trial court to impanel a new sentencing jury.

(2) If the prosecutor elects subdivision (1)(B) of this section, above, the trial court shall impanel a new jury for the purpose of conducting new sentencing proceedings;

(3) Resentencing proceedings shall be governed by the provisions of §§ 5-4-602(4) and 5-4-603 — 5-4-605;

(4) All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding; additional relevant evidence may be admitted including testimony of witnesses who testified at the previous trial;

(5) The provisions of this section are procedural; they shall apply retroactively to any defendant sentenced to death after January 1, 1974.

(6) This section shall not be construed to amend the provisions of § 5-4-602 requiring the same jury to sit in both the guilt and sentencing phases of the original trial.

5-4-617. Method of execution.

(a)(1) The punishment of death is to be administered by a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant's death is pronounced according to accepted standards of medical practice.

(2) The Director of the Department of Correction shall determine the substances to be uniformly administered and the procedures to be used in any execution.